U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 10Apr2002

Case No: 2001-INA-00141

In the Matter of:

KUMAR INDUSTRIES
Employer

On Behalf of:

JOSE GUZMAN
Alien

Appearance: Beretta Aldo, Esq.
for the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Jose Guzman("Alien") filed by Employer, Kumar Industries ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not

sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On July 16, 1996, the Employer filed an amended application for labor certification to enable the Alien to fill the position of custom fabricator layout worker I in its metal framing system production company.

The duties of the job offered were described as follows:

"Lays out reference points & dimensions on sheets, plates, tubes & structural shapes for fabricating, welding & assembling into structural metal products; plans and develops layout as outlined on blueprints & templates, applying, knowledge of product design, effects of heat, allowances for curvature & thickness of metal. Details location and sequence of cutting, drilling, bending, rolling punching and welding operations, using instruments such as compass, protractor, dividers & rule. Marks curves, lines, holes, dimensions & welding symbols on to workplace, using scribes, soapstone & punches. Will fit & align fabricated parts for welding on assembly operations."

A six grade education and four years experience in the job was required. Wages were $17.39 per hour; 1 ½ for overtime; employer pays for lunch break. The applicant supervises 0 employees and reports to the Supervisor. (AF-13-160)

On January 25, 2001, the CO issued a NOF denying certification. The CO citing Section 656.21(b)(6) and/or 656.21(j)(1)(iii) and (iv) found that U.S. workers were rejected for other than lawful reasons. Specifically: "From documentation submitted, it appears U.S. workers TOWNSEND, BRAMMER, BASS and FIGUEIREDO were rejected for other than valid, job-related reasons. Your 'interview' of these applicants did not cover portions of their resumes that address the job duties. For instance: TOWNSEND's resume states he had experience with McDonnell Douglas in 1988-92 involving '[s]kills also include... all precision and lay-out instruments,' And you quibble with BRAMMER's experience 'he has performed some of the duties of a Layout worker sporadically over a period of seven years...[t]his position requires four full time years of experience as a Layout worker.'; the 'full time' requirement appears nowhere on the ETA750A. BRAMMER reports by questionnaire that you told him you considered him fully qualified. There is further room for doubt you actually made contact with applicants FIGUEIREDO and BASS. The letter you sent them dated April 28 stated the interview was to be April 6!" Corrective action was that Employer must explain with specificity the lawful job-related reasons for not hiring each worker referred and give the job title of the interviewer. The CO, also, found Employer did not give sufficient evidence of efforts to contact qualified applicants Petruskie, Gallaher and Pena. Evidence of contact such as telephone receipts were required. (AF-9-11)

On February 28, 2001, Employer forwarded its rebuttal through counsel, which addressed reasons for rejections of applicants. Mr. Townsend, Employer alleged, according to his resume has experience only as a truck driver and a jib/fixture builder, neither of which qualifies him for the job of custom fabricator lay-out worker. Mr. Brammer was interviewed and found to be somewhat familiar with the type of work and fully qualified for training but did not provide documentation as to where and when he gained experience as a Lay-out worker. Both Bass and Figueiredo were sent an invitation letter mailed May 1, 1996 return receipt received May 5, 1996. "Unfortunately the letter reflected a typographical error, however, was not the employer's intention to discourage an U.S. worker whatsoever." The two applicants did not attempt to contact Employer. The person contacting U.S. applicants was Mr. Joe Rivas, Manager, under the direction of Mr. Saj Agrawal, President. Applicant Gallagher, Employer contended, was contacted but twice refused to submit his resume, and stated

he was no longer interested. Applicant Petruskie signed for his letter which contained an interview date of May 15, 1996 at 5:00 p.m. but he never showed up. Applicant Pena didn't pick up his mail return receipt requested. (AF-6-8)

On May 2, 2001 the CO issued a Final Determination denying certification, stating: "Your assertion TOWNSEND'S experience in a different industry would require re-training which would not be of economic benefit to you is not convincing: it is evident the alien gained metal lay-out fabricating experience in another industry, yet you were willing to re-train him. You do not offer the same to TOWNSEND. Your discounting of BRAMMER'S lay-out experience as part of other duties and disregard of his ownership of a fabrication firm introduce subjective criteria into evaluating his qualifications beyond those stated on the ETA750A. Although you declare it 'was not the employer's intention to discourage an [sic] U.S. worker' you placed the burden upon qualified U.S. workers BASS and FIGUEIREDO to remedy your typographical error by calling you about it, a burden where it does not belong. There is no evidence you attempted contact when you discovered the error. We are not convinced you have given valid, job-related reasons for rejecting these four U.S. workers." The CO, also, found that the contact with the other three applicants may have been timely, there was not adequate followup by telephone, or in the case of Pena, his return receipt was not signed. (AF-4-5)

On June 6, 2001, the Employer filed a request for review of denial of labor certification. (AF-1-3)

DISCUSSION

The employer has the burden of persuasion on the issue of lawful rejection of U.S. workers. Cathay Carpet Mill, Inc., 1987-INA- 161 (Dec. 7, 1988)(en banc) While the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. H.C. LaMarche Enterprises, Inc. 1987-INA-607 (Oct. 27, 1988); Cotton L.A., 2000-INA-313 (Sept. 25, 2001) Although written assertions constitute documentation that must beconsidered under Gencorp, 1987-INA-659 (January 13, 1988)(en banc), bare assertions without supporting evidence are generally insufficient to carry an employer's burden of proof. (Sang Chung Insurance Agency, 2000-INA-259 (January 11, 2001)

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 1988-INA-313 (1989); Belha Corp., 1988-INA-24 (1989)(en banc).

We believe the record speaks for itself. The CO has given valid reasons for denial of labor certification in its NOF which have not been adequately rebutted. The Employer has failed to carry its burden of demonstrating a good faith effort to recruit qualified U.S. workers.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

A
JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.